



Security Council

Distr.
GENERAL

S/AC.26/2000/12
15 June 2000

Original: ENGLISH

UNITED NATIONS
COMPENSATION COMMISSION
GOVERNING COUNCIL

REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS
CONCERNING THE FIFTH INSTALMENT OF INDIVIDUAL CLAIMS FOR
DAMAGES ABOVE US\$100,000 (CATEGORY "D" CLAIMS)

CONTENTS

	<u>Paragraphs</u>	<u>Page</u>
Introduction	1 - 3	3
I. BACKGROUND	4 - 7	3
A. Background information	4 - 5	3
B. General legal framework	6	3
C. Applicable evidentiary standard	7	3
II. NEW ISSUES ARISING IN APPLICATION CLAIMS	8 - 15	4
A. Jurisdictional issues	9	4
B. D1(Money) issues: Claim for departure costs	10	4
C. D1(Money) issues: Claim for relocation expenses	11 - 12	4
D. D1 MPA issues: Claim for illegal detention	13	5
E. D3(Death - Medical Expenses, Support and Mental Pain and Anguish)	14 - 15	5
III. PANEL DETERMINATIONS ON OTHER CLAIMS IN THE FIFTH INSTALMENT	16 - 20	5
IV. CROSS CATEGORY ISSUES	21	6
V. RECOMMENDATIONS	22 - 33	7
A. Awards by submitting entity	22	7
B. Interest and exchange rates	23 - 25	7
C. Corrections to previously reported claim awards	26	7
1. Part one of the first instalment correction	27	7
2. Part one of the second instalment corrections	28 - 30	8
3. Third instalment corrections	31 - 32	8
D. Submission through the Executive Secretary to the Governing Council	33	9
Notes		10
Annex		12

Introduction

1. This is the ninth report to the Governing Council of the United Nations Compensation Commission (the "Commission") submitted pursuant to article 38(e) of the Provisional Rules for Claims Procedure (the "Rules"), by the "D1" Panel of Commissioners (the "Panel"), being one of two Panels appointed to review individual claims for damages above US\$100,000 (category "D" claims). 1/ This report contains the determinations and recommendations of the Panel in respect of the fifth instalment, comprising 520 category "D" claims, submitted to the Panel by the Executive Secretary of the Commission pursuant to article 32 of the Rules on 20 July 1999.

2. The 520 claims contain loss types for which methodologies have already been developed ("application claims") 2/.

3. The Panel began its review of the fifth instalment on 20 July 1999. In addition to regular communications, the Panel met at the Commission's headquarters in Geneva to consider the claims on the following dates: 18-21 July 1999, 6-8 September 1999, 15-17 November 1999, 20-21 December 1999 and 27-29 January 2000.

I. BACKGROUND

A. Background information

4. The factual background relating to Iraq's invasion and occupation of Kuwait that was taken into account by the Panel in reviewing claims in the fifth instalment is set out in detail in its First and Second Reports. 3/

5. The Panel has taken into consideration additional relevant material, including information accompanying the submission of these claims provided by the Executive Secretary pursuant to article 32 of the Rules, and additional information and views presented by Governments that have submitted claims, and by the Government of Iraq, in response to the reports submitted to the Governing Council by the Executive Secretary in accordance with article 16 of the Rules. In addition, the Panel has been assisted by expert consultants in the valuation of claims for D4(personal property) losses.

B. General legal framework

6. The general legal framework for the resolution of category "D" claims is set out in chapter V of the Panel's First Report.

C. Applicable evidentiary standard

7. The issue of the evidentiary standard to be applied in reviewing category "D" claims was addressed by the Panel in chapter VI of the First Report and chapter II of the Second Report. 4/ The Panel's recommendations

in these two reports were approved by the Governing Council in decisions 47 and 49 respectively. 5/ As with previous instalments, the Panel has reviewed the claims in the present instalment and made its recommendations by assessing the documentary and other appropriate evidence as well as balancing the interests of claimants, who had to flee a war zone, with the interests of the Government of Iraq, which is liable only for damage caused as a direct result of its invasion and occupation of Kuwait.

II. NEW ISSUES ARISING IN THE APPLICATION CLAIMS

8. Some of the application claims in this instalment raise new issues that were not dealt with in any of the Panel's previous reports. Wherever claims gave rise to new issues not considered in previous instalments, the Panel ensured that these were resolved so as to be consistent with established methodologies. These new issues and the Panel's determinations thereon are set out below.

A. Jurisdictional issues

9. The Panel considered a claim by an individual who was living in Saudi Arabia. He claimed personal property and income losses allegedly sustained as a result of his being deported together with his family from Saudi Arabia pursuant to a royal decree, on the grounds that he was suspected of collaborating with the Iraqis. The Panel determines that the claim is not compensable as the asserted losses did not occur as a direct result of Iraq's invasion and occupation of Kuwait.

B. D1(Money) issues: Claim for departure costs

10. The Panel considered a D1(money) claim for departure costs. The claim is for the costs of the claimant's airflight from Baghdad to Kuwait, incurred by the claimant in an effort to locate his luggage that did not arrive in Baghdad after his departure from Kuwait. The Panel determines that the claimant's flight to Kuwait to locate his lost luggage, and thereby mitigate his personal property loss, is compensable.

C. D1(Money) issues: Claim for relocation expenses

11. The Panel considered a D1(money) claim for relocation losses for a claimant and his family. The claim is for the costs incurred after departing Kuwait and relocating to Cyprus for one year before moving to Jordan. He claimed accommodation costs, comprising rent, electricity and water charges. The Panel determines that the claimant be awarded the maximum for relocation costs fixed by the Panel, being the equivalent of three months rental of the apartment and the water and electricity charges during that period. Rental expenses, water and electricity charges outside that period can not be considered relocation expenses of a temporary and extraordinary nature. 6/

12. The Panel considered a D1(money) claim for relocation costs for packing, shipping and customs duty expenses that the claimant incurred for the retrieval and delivery of his personal property in April 1993. The Panel determines that the claim is compensable as the claimant's retrieval of his personal property mitigated his personal property loss.

D. D1 MPA issues: Claim for illegal detention

13. The Panel considered a D1(MPA) claim for illegal detention. After the invasion, the claimant, a national from an OECD country, continued to work for his Iraqi employer as his employer advised him that it was less likely that he would be taken hostage if he was still working. The claimant considered this to be his illegal detention. The Panel determines that the claim for D1(MPA) is not compensable, as the claimant had agreed to continue working for his employer.

E. D3(death): Medical expenses, support and mental pain and anguish (MPA)

14. The Panel considered a D3(death) claim for medical expenses, support and mental pain and anguish for the birth of the claimant's stillborn child. The claimant alleged that the Iraqi staff running the Kuwaiti hospital where she gave birth to the child performed an unnecessary and unauthorized caesarean operation negligently which resulted in the child's death. A medical certificate from the hospital states that the child was stillborn. The Panel determines that the claimant had failed to establish a direct link between the stillborn birth of the child and the invasion and occupation of Kuwait and, as a consequence, the D3(death) claim for medical expenses is not compensable. The claimant was however compensated under D2(personal injury) for both MPA and her medical expenses for the serious personal injury she suffered due to the lack of post-operative care.

15. The Panel considered another D3(death) claim for support and MPA and a D2(personal injury) claim for medical expenses and MPA. The claimant, his parents and sisters were involved in a bus accident in Iraq while being evacuated from Kuwait. As a result of the accident, the claimant's parents died and the claimant's youngest sister sustained compound fractures to the left leg. The Panel, being in agreement with the principles set out in the Second "B" Report, determines that the death and personal injury claims are compensable. 7/ The Panel notes that the category "B" Panel of Commissioners took into consideration that many claimants involved in such accidents had no other choice but to try and reach their home by whatever means was available.

III. PANEL DETERMINATIONS ON OTHER CLAIMS IN THE FIFTH INSTALMENT

16. As was the case in part one of the fourth instalment, in the fifth instalment all the claims have been designated application claims. At each of its meetings in Geneva the Panel has therefore extensively reviewed individual claims, examined the application of the methodologies developed

by the Panel, and satisfied itself that the appropriate methodologies have been applied to the claims in the instalment.

17. Some claimants failed to submit any documentation in support of personal property losses, and have not responded to requests for additional information pursuant to article 34 of the Rules. Some claimants failed to prove their presence or residence in Iraq or Kuwait before or at the time of the invasion. The Panel determines that no compensation should be awarded for those claims. One claimant in the fifth instalment has withdrawn his claim.

18. The Panel deferred its consideration of a small number of claims because they contain loss types that cannot be resolved in the fifth instalment. These include claims for D8/9(business) losses for which a methodology is yet to be developed. In addition, the Panel has reviewed claims in this instalment with intangible property losses and has deferred them in order that further analysis can be undertaken and appropriate principles developed in considering such claims.

19. A number of claimants filed claims in category "D" specifically for interest on the value of their category "C" or "D" claims. In its First Report, the Panel recommended that interest be paid in accordance with Governing Council decision 16. 8/

20. The Panel has also considered a number of claims for claim preparation costs, including legal and loss adjusting fees. In a letter dated 6 May 1998, the Panel was notified by the Executive Secretary that the Governing Council intends to resolve the issue of claim preparation costs at a future date. Accordingly, the Panel takes no action with respect to the claims for such costs.

IV. CROSS CATEGORY ISSUES

21. Recommended awards in respect of claims in this instalment are reported net of deductions of "A", "B" and "C" approved awards. 9/

V. RECOMMENDATIONS

A. Awards by submitting entity

22. The annex hereto lists the awards recommended by the Panel for each Government and international organization that has claimants included in the fifth instalment. Each Government and international organization will be provided with a confidential list containing the individual recommendations made in respect of its claimants. As will be seen from the annex, against the total amount claimed of US\$119,969,976.38 the Panel has recommended compensation totalling US\$45,865,923.46.

B. Interest and exchange rates

23. The Panel recommends that interest be awarded pursuant to its determinations as set out in paragraphs 64-65 of its First Report.

24. For purposes of calculating recommended amounts, the Panel has converted currencies into United States dollars in accordance with the rates set out in paragraphs 61-63 of its First Report.

25. In paragraph 39 of its Fifth Report, the Panel noted that where losses are claimed for money in currencies other than United States dollars and it is established that the application of the exchange rate approved by the Panel in its First Report would result in either under-compensation or over-compensation of the claimant, the Panel determined that it will select a conversion rate based on the evidence that most closely compensates the claimant for the value of the losses suffered. In particular, this would be applied in situations where the claimant has submitted evidence that he or she purchased the money at a rate different from the rate adopted by the Panel.

C. Corrections to previously reported claim awards

26. In accordance with procedures set out in article 41 of the Rules for the correction of award amounts previously reported in an instalment and approved by the Governing Council, the Panel recommends approval of the corrected amounts as described in the following paragraphs. 10/ A confidential listing containing a revised breakdown of amounts in respect of individual claimants will be provided to the submitting entities affected.

1. Part one of the first instalment correction

27. In respect of one D3(MPA) claim, a recommendation for an award was calculated on the basis that only the claimant was eligible for compensation. It has now been shown that the claim includes one other family member who is also eligible to receive a D3(MPA) award and the Panel

therefore recommends that an additional award be made. The concurrent recommended change to the submitting entity award is listed below:

<u>Submitting entity</u>	<u>Previous recommended award (US\$)</u>	<u>Corrected recommended award (US\$)</u>
Kuwait	1,059,075.26	1,062,425.26

2. Part one of the second instalment corrections

28. Four claims in part one of the second instalment require correction. In two of these claims, compensation was recommended for D1(MPA) on the basis that the claims were made only by the claimant who submitted the claim form. However, pursuant to a representation by the Government of Kuwait, made under article 41 of the Rules, the Panel recommends that awards should also be made for family members included in the claim. On the other hand, another claim submitted by the Government of Kuwait and approved in the same instalment was treated as a family claim for D3(death) losses, when in fact there was only one eligible claimant. This claim also requires correction.

29. The fourth claim to be corrected was submitted by the Government of India. In that claim, end of term indemnities were incorrectly deducted.

30. The concurrent recommended changes to the respective submitting entity awards are listed below:

<u>Submitting entity</u>	<u>Previous recommended award (US\$)</u>	<u>Corrected recommended award (US\$)</u>
India	393,986.27	400,041.27
Kuwait	1,728,458.48	1,697,556.67

3. Third instalment corrections

31. The Government of Kuwait, in its representation under article 41 referred to in paragraph 28 above, also identified two claims where family members were to be included in the individual's D1(MPA) claim. The Panel recommends this correction. The concurrent recommended change to the respective submitting entity award is listed below:

<u>Submitting entity</u>	<u>Previous recommended award (US\$)</u>	<u>Corrected recommended award (US\$)</u>
Kuwait	2,381,113.86	2,399,963.86

D. Submission through the Executive Secretary to the Governing Council

32. The Panel respectfully submits this report pursuant to article 38(e) of the Rules, through the Executive Secretary to the Governing Council.

Geneva, 29 January 2000

(Signed) R.K.P. Shankardass
Chairman

(Signed) H.M. Joko-Smart
Commissioner

(Signed) M. C. Pryles
Commissioner

Notes

1/ S/AC.26/1992/10.

2/ In the first instalment of category "D" claims, the Panel developed methodologies for the following loss types: D1(money); D1(mental pain and anguish ("MPA")); D3(death); D4(motor vehicles); D6(loss of income); D10(payment and relief to others); and D10(other). A full description of the methodologies is set out at paragraphs 103 to 380 of the "Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the First Instalment of Individual Claims for Damages Above US\$100,000 (Category "D" Claims)" (S/AC.26/1998/1) ("First Report"). The Panel developed methodologies for the following loss types in part one of the second instalment: D2(personal injury) and D5(loss of bank accounts, stocks and other securities). These methodologies are described in the "Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the Second Instalment of Individual Claims for Damages Above US\$100,000 (Category "D" Claims)" (S/AC.26/1998/11) ("Third Report"), in paragraphs 41-115. Further, the Panel developed the methodology for D4(personal property) losses in part two of the second instalment. This methodology is described in the "Report and Recommendations Made by the Panel of Commissioners Concerning Part Two of the Second Instalment of Individual Claims for Damages Above US\$100,000 (Category "D" Claims)" (S/AC.26/1998/15) ("Fourth Report"), in paragraphs 30-57.

3/ See in particular chapter II of the First Report and chapter IV of the "Report and Recommendations Made by the Panel of Commissioners Concerning Part Two of the First Instalment of Individual Claims for Damages Above US\$100,000 (Category "D" Claims)" (S/AC.26/1998/3) ("Second Report").

4/ See also paragraph 8 of Governing Council decision 7 (S/AC.26/1991/7/Rev.1) which provides that "[s]ince ... [category D] claims may be for substantial amounts, they must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss". See also articles 35(c) and (3) of the Rules.

5/ S/AC.26/Dec.47 (1998) and S/AC.26/Dec.49 (1998).

6/ See para.128 of the First Report.

7/ See paras 20-24 of the "Report and Recommendations made by the Panel of Commissioners Concerning Part One of the Second Instalment of Claims for Personal Injury or Death (Category "B" Claims)" (S/AC.26/1994/4).

8/ Paragraph 1 of decision 16 (S/AC.26/1992/16) states that "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award." See also paras. 64-65 of the First Report.

9/ See para. 21 of the "Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the Fourth Instalment of Individual Claims for Damages Above US\$100,000 (Category "D" Claims)" (S/AC.26/1999/21).

10/ Article 41 states that:

"1) Computational, clerical, typographical or other errors brought

to the attention of the Executive Secretary within 60 days from the publication of the decisions and reports, will be reported by the Executive Secretary to the Governing Council

2) The Governing Council will decide whether any action is necessary. If it is determined that a correction must be made, the Governing Council will direct the Executive Secretary as to the proper method of correction".

Annex

SUMMARY RECOMMENDATIONS OF THE FIFTH INSTALMENT
OF CATEGORY "D" CLAIMS

<u>Submitting entity</u>	<u>Amount claimed (US\$)</u>	<u>Number of claims recommended</u>	<u>Number of claims not recommended for payment or (deferred) a/</u>	<u>Amount of compensation (US\$)</u>
Algeria	99,695.50	1	0	20,010.22
Australia	243,321.59	1	0	100,613.39
Austria	193,658.40	1	0	31,340.52
Canada	1,287,398.01	10	1 (1)	311,443.54
France	270,791.51	1	1	11,015.57
Germany	593,911.80	4	1	288,807.51
Greece	145,340.00	1	0	20,000.00
Iceland	-	0	(1)	-
India	38,145,753.53	179	30 b/ (5)	5,101,591.40
Ireland	840,918.00	1	1	167,759.24
Israel	-	0	(1)	-
Italy	692,887.58	3	0	128,363.61
Jordan	10,767,960.07	38	1 (1)	1,626,531.98
Kuwait	42,210,244.61	121	2 (5)	31,838,923.83
Lebanon	798,692.03	3	0	273,550.63
Morocco	101,785.20	1	0	65,875.76
Netherlands	-	0	(1)	-
Pakistan	1,422,430.60	5	(1)	617,591.08
Philippines	110,847.00	1	0	39,020.02
Poland	48,961.00	1	0	19,134.95
Sudan	1,927,272.21	13	(2)	367,002.85
Sweden	324,341.60	2	0	108,508.62
Syria	510,104.61	6	0	313,180.53
United Kingdom	13,112,235.51	33	6 (1)	2,007,252.42
United States of America	5,063,997.59	23	(2)	2,070,997.53

<u>Submitting entity</u>	<u>Amount claimed (US\$)</u>	<u>Number of claims recommended</u>	<u>Number of claims not recommended for payment or (deferred) a/</u>	<u>Amount of compensation (US\$)</u>
UNDP Kuwait	134,993.08	1	0	106,407.11
UNDP Washington	80,719.96	2	0	2,076.00
UNHCR Canada	533,000.00	1	0	95,433.57
UNRWA Gaza	308,715.39	3	0	133,491.58
<u>Total</u>	119,969,976.38	456	43 (21)	45,865,923.46

a/ Numbers in parentheses represent claims that have been deferred for reasons set out in paragraph 18 of the report.

b/ Includes one withdrawn claim.
